A **MOHD NOR AFANDI MOHAMED JUNUS**

v.

RAHMAN SHAH ALANG IBRAHIM & ANOR

B COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
JAMES FOONG JCA
SURIYADI HALIM OMAR JCA
[CIVIL APPEAL NO: A-01-95-2006]
C 8 OCTOBER 2007

TORT: *Negligence - Motor accident - Claim for damages - Liability - Plate number on motor lorry bearing index mark "ZA" - Whether raising presumption that motor lorry belonged to Armed Forces and therefore* D *Government of Malaysia - Whether driver presumed to be servant and/or agent of Government - Whether driver an "officer' of the Government - Whether Government liable - Government Proceedings Act 1956, ss. 2, 5, 6 - Road Transport Act 1987, ss. 7, 8 - Motor Vehicles (Registration & Licencing) Rules 1959, r. 28*

E ***CIVIL PROCEDURE:*** *Trial - Motor accident - Negligence - End of plaintiff's case - Submission of no case to answer - Defendant electing not to call rebutting evidence - Effect - Whether plaintiff's evidence presumed to be the truth*

F ***WORDS & PHRASES:*** *"Officer" - Government Proceedings Act 1956, ss. 2, 5, 6*

The plaintiff/appellant was claiming damages against the driver of motor lorry bearing registration number ZA 2596 ('first defendant') G and the Government of Malaysia ('second defendant), for injuries and damage sustained in a collision between the said motor lorry and a motorcycle ridden by the plaintiff. At the hearing, the plaintiff adduced evidence that he was in his lawful path when the motor lorry encroached and collided against him. No evidence was H however offered as to the relationship that existed between the first and second defendants, or the ownership of the motor lorry, and that being so, at the end of the plaintiff's case, where the second defendant submitted a no case to answer and opted not to adduce any evidence, the subordinate court judge dismissed the I claim on the grounds that the plaintiff failed to prove that: (i) the

driver of the motor lorry ZA 2596 was an "officer" under s. 5 of the Government Proceedings Act 1956 ('GPA'); and (ii) the second defendant was the registered owner of the vehicle. The decision notwithstanding, the trial judge however went on to assess damages and found that in the event that the second defendant was liable, the plaintiff should be entitled to general damages of RM85,150 and special damages of RM745 based on 100% liability.

The plaintiff appealed whereon the High Court allowed the appeal against the first defendant but not against the second appellant. The plaintiff appealed further, albeit only on the liability of the second defendant, and essentially posed the following questions for the consideration of the learned appellate judges, namely: (i) whether the fact that the motor lorry was carrying the licence plate number ZA 2506 raised the presumption that it belonged to the military and the second defendant; (ii) whether the first defendant, the driver of the motor lorry, ought to be presumed to be the servant and/or agent of the second defendant; and (iii) whether the second defendant's option not to adduce any evidence herein was fatal to its case.

Held (allowing appeal and setting aside order of High Court) Per Suriyadi Halim Omar JCA (Gopal Sri Ram JCA concurring) delivering the majority judgment of the court:

(1) Once a defendant elects not to call for evidence, apart from him being bound by that election, the effect is that all the evidence led by the plaintiff must be assumed to be true (*Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng* (foll)). (para 10)

(2) In this case, the plaintiff's evidence as adduced, *prima facie*, had established that: (i) the plaintiff was in his lawful path; (ii) the first defendant had encroached onto the plaintiff's path; (iii) a collision had occurred; (iv) the vehicle driven by the first defendant carried number ZA 2596; and (v) as testified by the investigation officer, the vehicle was owned by the army. (paras 11, 13)

(3) Under the Fifth Schedule to the Motor Vehicles (Registration and Licencing) Rules 1959 ('the Rules'), all index marks starting with 'Z' on motor vehicles belong to the armed forces. It is also clear that, reading the said Fifth Schedule with r. 28 of the Rules, the index marked 'Z' also belongs to the Government of Malaysia. It is therefore obvious that, according to the Rules, the motor vehicle bearing the number ZA 2596 belonged to the Government of Malaysia. (paras 13, 14 & 15)

(4) The driver who drove the impugned vehicle must be presumed to have driven it with the permission of the second defendant. The presumption too is that the driver was the servant and agent of the owner of the vehicle, *ie*, the second defendant Government of Malaysia. It follows that, to avoid the responsibility, it was up to the latter to rebut the presumption(s). (para 21)

(5) The evidence adduced was satisfactory, reliable and by no stretch of imagination farfetched, to vitiate the presumption of truth at the stage of the plaintiff's case. With the quality evidence before the court being presumed to be true, the logical step was for the court to find for the plaintif, what with the defendant not being assisted by the non-materialization of rebuttal evidence. On the facts, it is also clear that the plaintiff had established the ingredients of s. 5 of the GPA. (*Kayat & Anor v. Lim Yew Sing* (foll)). (paras 22 & 23)

(6) The submission of the second defendant was one of no case to answer *simpliciter*, and not a plea of no case to answer based on unsatisfactory or unreliable nature of the evidence led by the plaintiff. That being so there is no reason whatsoever to remit the case for a new trial. We would therefore allow the appeal on liability and set aside the order of the High Court. (para 24)

Per James Foong JCA (dissenting):

(1) From the evidence, there is little doubt that the first defendant was negligent in colliding into the plaintiff. But what is more important is whether the second defendant was vicariously liable for the negligent act of the first defendant. From the applicable principles, the plaintiff must first

establish a relation between the first defendant and the second defendant and then prove that the negligent act committed is connected to the nature of this relationship. (para 41)

(2) There was in this case no relationship whatsoever existing between the first defendant and the second defendant. It is also to be noted that before the principle in *Kayat & Anor* (where a car is driven by a person other than the owner, the presumption is raised that the driver is the servant or agent of the owner) applies, the prerequisite of the motor vehicle actually belonging to the person accused of being vicariously liable must be established. (paras 42 & 43)

(3) In this case, to prove ownership, the plaintiff only advanced the evidence that the motor lorry was carrying a number plate that bore an index mark which according to r. 28 of the Rules reveals the owner as being the Armed Forces and therefore the Government of Malaysia. But this is insufficient because: (i) the plaintiff agreed that the motor lorry was then carrying palm fruit and not a military vehicle; (ii) a vehicle number plate displaying an index mark followed by a set of numbers (here ZA 2596) mounted on a vehicle is only an indication that the vehicle is registered under s. 7 of the Road Transport Act 1987 – whereof to ascertain ownership of the vehicle, reference must be made to the register kept by the Director of Road Transport. (para 44)

(3a) If a presumption of ownership of a motor vehicle could arise merely from an indication of a motor vehicle number plate, then it can only mean that the burden of proof upon the plaintiff to establish vicarious liability is exceedingly light. And the consequences are more far-reaching if it is followed by the presumption that, when a vehicle is driven by a person other than the owner it is presumed that the driver is the servant or agent of the owner. This amounts to double presumptions and should be discouraged. (paras 45 & 46)

(4) Assuming that the presumptions should arise as to the ownership of the vehicle being the second defendant and the driver being the servant and/or agent of the second defendant, there is still the requirements of ss. 5 and 6(1) of

A the GPA to be satisfied. It is thus explicit that before the second defendant can be held to be liable for the negligent act of its officer, there must be proceedings against the officer personally. (paras 47 & 48)

B **(4a)** In this case, while the plaintiff had commenced proceeding against first defendant, the first defendant, however, did not come within the meaning of "officer" under s. 2 of the GPA. This can be seen from the testimony of the plaintiff himself when he said that "Rahman earned his living delivering oil C palm". When the first defendant was engaged in such activity to earn a living, certainly he could not be an officer of the second defendant. In the circumstances, I can only share the views as expressed by the courts below, namely that the plaintiff has not proved his case against the second D defendant. (paras 47, 48 & 49)

Bahasa Malaysia *Translation Of headnotes*

Plaintif/perayu menuntut gantirugi dari pemandu sebuah motorlori bernombor pendaftaran ZA 2596 ('defendan pertama') dan E Kerajaan Malaysia ('defendan kedua') atas kecederaan dan kerugian yang dialaminya ekoran kemalangan yang berlaku di antara motor lori tersebut dengan motorsikal yang ditunggang oleh plaintif. Di pendengaran, plaintif mengemukakan keterangan bahawa beliau berada di lorongnya yang betul apabila motorlori F memakan jalannya dan melanggarnya. Bagaimanapun, tiada keterangan dikemukakan tentang perhubungan yang wujud di antara defendan pertama dan kedua, atau mengenai keempunyaan motorlori, dan dalam keadaan sedemikian, di akhir kes plaintif, di mana defendan kedua menghujahkan tiada kes untuk dijawab G sekaligus memilih untuk tidak memberikan apa-apa keterangan, hakim mahkamah rendah telah menolak tuntutan atas alasan bahawa plaintif gagal membuktikan bahawa: (i) pemandu motorlori ZA 2506 adalah seorang "pegawai" di bawah s. 5 Akta Prosiding Kerajaan 1956 ('APK'); dan (ii) defendan kedua adalah pemilik H motorlori tersebut. Walaupun begitu, hakim bicara telah membuat penilaian mengenai kerugian dan mendapati bahawa sekiranya defendan kedua bertanggungan, maka plaintif harus berhak kepada gantirugi am sebanyak RM85,150 dan ganti rugi khas sebanyak RM745 berdasarkan tanggungan 100%.

I

Plaintif merayu di mana Mahkamah Tinggi membenarkan rayuan terhadap defendan pertama tetapi tidak terhadap defendan kedua. Plaintif merayu seterusnya, walaupun cuma terhadap liabiliti defendan kedua, dan secara pentingnya mengemukakan persoalan-persoalan berikut untuk pertimbangan yang arif hakim-hakim rayuan, iaitu: (i) sama ada fakta bahawa motorlori membawa plet nombor ZA 2506 membangkitkan anggapan bahawa ia dimiliki oleh tentera dan defendan kedua; (ii) sama ada defendan pertama, selaku pemandu motorlori, harus dianggap sebagai pekerja dan/atau agen defendan kedua; dan (iii) sama ada pilihan defendan kedua untuk tidak mengemukakan apa-apa keterangan di sini telah memudaratkan kesnya.

Diputuskan (membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi)
Oleh Suriyadi Halim Omar HMR (Gopal Sri Ram HMR menyetujui) menyampaikan penghakiman mahkamah:

(1) Sebaik seorang defendan memilih untuk tidak memberikan keterangan, selain dari beliau terikat dengan pilihannya itu, kesannya adalah bahawa semua keterangan yang dibawa oleh plaintif hendaklah dianggap sebagai benar (*Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng* (diikuti)).

(2) Dalam kes ini, keterangan plaintif seperti yang dikemukakan, secara *prima facie*nya, menunjukkan bahawa: (i) plaintif berada di lorongnya yang betul; (ii) bahawa defendan pertama telah memakan jalan plaintif; (iii) telah berlaku perlanggaran; (iv) kenderaan yang dipandu oleh defendan pertama membawa nombor plet ZA 2596; dan (v) seperti yang dijelaskan oleh pegawai penyiasat kenderaan dimiliki oleh tentera darat.

(3) Di bawah Jadual Kelima Peraturan-Peraturan Kenderaan Bermotor (Pendaftaran dan Pelesenan) 1959 ('Peraturan'). Semua tanda huruf yang bermula dengan 'Z' pada kenderaan bermotor adalah kepunyaan tentera. Adalah juga jelas bahawa, membaca Jadual Kelima tersebut dengan per. 28 Peraturan, huruf 'Z' juga adalah milik Kerajaan Malaysia. Oleh itu jelas bahawa, menurut Peraturan, kenderaan bermotor yang membawa nombor ZA2596 dimiliki oleh Kerajaan Malaysia.

(4) Pemandu yang memandu kenderaan yang berkenaan di sini hendaklah dianggap sebagai memandunya dengan kebenaran defendan kedua. Juga harus dianggapkan bahawa pemandu adalah pekerja atau agen pemilik kenderaan tersebut, iaitu defendan kedua Kerajaan Malaysia. Ianya mengikut bahawa, untuk mengelak liabiliti, terpulanglah kepada defendan kedua untuk menyangkal anggapan.

(5) Keterangan yang dikemukakan adalah memuaskan, meyakinkan, dan bukan sesuatu yang tidak boleh dijangkau sehingga boleh menyangkal kebenarannya di peringkat kes plaintif. Dengan keterangan yang berkuali berada di hadapan mahkamah dan dianggap sebagai benar, maka langkah yang logik adalah bagi mahkamah mendapati untuk pihak plaintif, apalagi dalam keadaan defendan langsung tidak dibantu apa-apa keterangan menyangkal. Berdasarkan fakta, adalah juga jelas bahawa plaintif telah membuktikan ingredien-ingredien di s. 5 APK (*Kayat & Anor v. Lim Yew Sing* (diikuti)).

(6) Penggulungan hujah defendan kedua adalah penggulungan tiada kes untuk dijawab *simpliciter*, dan bukan suatu hujah tiada kes untuk dijawab yang diasaskan kepada keterangan tidak memuaskan atau tidak boleh dipercayai yang dikemukakan oleh plaintif. Oleh yang demikian, tiada alasan untuk memerintahkan perbicaraan semula kes. Dengan itu kami membenarkan rayuan dan mengenepikan perintah Mahkamah Tinggi.

Oleh James Foong HMR (menentang):

(1) Dari keterangan, tiada keraguan bahawa defendan pertama cuai kerana menyebabkan perlanggaran dengan plaintif. Namun apa yang lebih penting adalah sama ada defendan kedua bertanggungan secara vikarius atas kecuaian defendan pertama. Berdasarkan prinsip-prinsip terpakai, plaintif hendaklah membuktikan dulu perhubungan yang wujud di antara defendan pertama dan defendan kedua dan kemudiannya bahawa perbuatan cuai adalah berkaitan dengan sifat perhubungan tersebut.

(2) Dalam kes ini, tidak wujud apa-apa perhubungan di antara defendan pertama dan defendan kedua. Juga harus diingat bahawa sebelum prinsip di dalam *Kayat & Anor* (di mana jika sebuah kereta itu dipandu oleh seorang yang bukan pemiliknya, maka terdapat anggapan bahawa pemandu itu adalah pekerja atau agen pemiliknya) terpakai, syarat bahawa kenderaan tersebut sebenarnya dimiliki oleh orang yang dikatakan bertanggungan secara vikarius itu hendaklah terlebih dahulu dibuktikan.

(3) Dalam kes ini, bagi membuktikan keempunyaan, plaintif hanya mengemukakan keterangan bahawa motorlori membawa nombor plet yang mempamerkan huruf yang mengikut k. 28 Peraturan menunjukkan pemiliknya sebagai Pasukan Bersenjata dan oleh itu Kerajaan Malaysia. Ini adalah tidak mencukupi kerana: (i) plaintif bersetuju bahawa motorlori pada waktu berkenaan membawa kelapa sawit dan bukannya kenderaan tentera; (ii) nombor plet kenderaan yang mempamerkan suatu huruf dan diikuti dengan nombor (di sini ZA 2596) hanya suatu indikasi bahawa kenderaan didaftarkan di bawah s. 7 Akta Pengangkutan Jalan 1987 – dimana bagi mempastikan keempunyaan kenderaan, rujukan hendaklah dibuat kepada Pengarah Pengangkutan Jalan.

(3a) Jika suatu anggapan keempunyaan sesebuah kenderaan bermotor boleh berbangkit hanya dari indikasi yang terpamer pada nombor plet kenderaan, maka ianya bermakna bahawa beban pembuktian atas plaintif untuk membuktikan tanggungan vikarius adalah terlalu ringan. Dan akibatnya akan menjadi lebih parah jika anggapan itu diikuti oleh anggapan bahawa pemandunya adalah pekerja atau agen pemilik. Ini bermakna anggapan berganda dan tidak harus digalakkan.

(4) Diandaikan bahawa anggapan boleh berbangkit mengenai keempunyaan kenderaan sebagai dimiliki oleh defendan kedua dan pemandunya sebagai pekerja dan/atau agen defendan kedua, masih terdapat kehendak-kehendak ss. 5 dan 6(1) APK yang perlu dipenuhi. Oleh itu, adalah jelas bahawa sebelum defendan kedua boleh diputuskan sebagai bertanggungan atas perbuatan cuai pegawainya, harus wujud prosiding terhadap pegawai tersebut secara peribadi.

(4a) Dalam kes di sini, sementara plaintif memang telah memulakan prosiding terhadap defendan pertama, defendan pertama tidak termasuk ke dalam maksud "pegawai" di bawah s. 2 APK. Ini dapat dilihat dari testimoni plaintif sendiri di mana beliau berkata "Rahman ambil upah bawa kelapa sawit". Memandangkan defendan pertama membuat kerja sedemikian untuk menampung hidupnya, beliau tidak boleh menjadi seorang pegawai defendan kedua. Maka dalam halkeadaan yang wujud, saya hanya mampu berkongsi pendapat dengan pandangan-pandangan yang diutarakan oleh mahkamah-mahkamah di bawah, iaitu bahawa plaintif telah gagal membuktikan kesnya terhadap defendan kedua.

Case(s) referred to:
Hewitt v. Bonvin [1940] 1 KB 188 ***(refd)***
Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 SC ***(foll)***
Kayat & Anor v. Lim Yew Seng [1971] 1 LNS 46 ***(refd)***
Kek Kee Leng v. Teresa Bong Nguk Chin & Anor [1978] 1 MLJ 61 ***(refd)***
See Keng Wah v. Lim Tew Hong [1955] 1 LNS 141 HC ***(refd)***
Simirah v. Chua Hock Lee & Anor [1963] 1 LNS 128 HC ***(refd)***
Storey v. Storey [1961] P 63 ***(refd)***
Young v. Rank [1950] 2 KB 510 ***(refd)***
Yuill v. Yuill [1945] 1 All ER 183 CA ***(refd)***

Legislation referred to:
Government Proceedings Act 1956, ss. 5, 6(1), 2
Motor Vehicles (Registration and Licensing) Rules 1959, r. 28
Road Transport Act 1987, ss. 7, 8

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, vol 37, p 396

For the appellant - Brijnandan Singh Bhar (Shailender Bhar with him); M/s Brijnandan Singh Bhar & Co
For the respondents - Azura Alwi; AG's Chambers

[Appeal from High Court, Ipoh; Civil Appeal No: 12-126-2004]

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Suriyadi Halim Omar JCA:

[1] The panel heard this appeal and at the end of the hearing by a majority decision had allowed it with costs. My learned brother James Foong Cheng Yuen JCA had dissented. The facts and antecedent of the case are as follows: a writ and statement were filed by the appellant but the first defendant had failed to file a defence. The respondent's defence was simple in that it had no idea what the appellant was talking about, was unaware and never was involved in the accident, and had categorically denied ownership of the alleged motor lorry carrying number plate ZA 2596 at the material time. That defence was in reply to the statement of claim which had alleged that the said motor lorry was owned by the respondent.

[2] The appellant, a rider of m/cycle BEH 704, had claimed damages against the driver of m/lorry ZA 2596 (one Rahman Shah b. Alang Ibrahim hereinafter referred to as the 1st defendant), as the servant and agent of the Government of Malaysia and sued as the 2nd defendant (hereinafter referred to as the respondent), for the injuries and damage sustained pursuant to a collision between them.

[3] The collision had occurred on 19 September 1997 at approximately 11.30am due to the alleged negligence of the 1st defendant. The appellant had come from the direction of Trolak Timor, when the 1st defendant driving the abovementioned motor lorry from the opposite direction had encroached onto the appellant's path, thus resulting in a collision.

[4] The respondent at the end of the hearing had submitted a no case to answer and had opted not to adduce any evidence. And despite the strong position of the appellant the subordinate court had still dismissed the writ, not only against the respondent but also against the 1st defendant who never even filed any defence. Being dissatisfied the appellant had filed an appeal against the whole decision. At the High Court the appellant was partially mollified when the learned judge allowed the appeal against the 1st defendant but not against the respondent. Still dissatisfied, as the appeal was only partially allowed an appeal was filed as against that unsuccessful part hence our hearing of this appeal. As stated at the outset we had allowed the appeal with costs.

Reasons For Allowing The Appeal

[5] I will start off with the issue of the respondent's submission of no case to answer. This entails perusing the notes of proceedings, so as to gauge whether the procedures had been faithfully complied, and whether there was proper appreciation of the law prior to the dismissal of the appellant's case. The pertinent parts of the notes of proceedings merely state the following:

Peguam plaintiff:

Tutup kes

Peguam Persekutuan:

1 saksi

Tarikh-11.5.2004

11.5.2004:

Peguam plaintiff tidak hadir

En. Asnawi untuk defendant (2)

Peguam Persekutuan

Pihak-pihak submit no case to answer dan tidak bercadang kemukakan keterangan.

Tarikh-20.5.2004 (hujah lisan)

20.5.2004:

Rujuk en. 26

Tarikh-28.5.2004 (sambung bicara).

28.5.2004:

Brijnandan Singh untuk plaintiff.

Asnawi untuk defendant (2)

(From the above last date until 16.5.2004 nothing important happened as either the judge went on leave or attended a course at ILKAP or at one of the mention dates both parties did not appear in court-my remarks)

16.7.2004

Baljit MOB untuk peguam plaintiff dan peguam defendant.

Mahkamah-keputusan seperti dilampiran (29).

Keputusan:

(The complete decision-my remarks)

[6] It is trite that when a submission of no case is undertaken, it means that a defendant at the close of the plaintiff's case (in this case the appellant's) either had not made out a case in law, or the evidence was unsatisfactory or unreliable for the court to hold that the burden had been discharged. In *Storey v. Storey* [1961] P 63, at p 5 the court had opined in the following manner:

> There are, however, two sets of circumstances under which a defendant may submit that he has no case to answer. In the one case there may be a submission that, accepting the plaintiff's evidence at its face value, no case has been established in law, and in the other that the evidence led for the plaintiff is so unsatisfactory or unreliable that the court should find that the burden of proof has not been discharged.

[7] Sifting the brief notes of proceedings as supplied above, it was quite obvious that the court had said very little prior to the decision date, when the action against both the defendants was eventually dismissed. The appellant's supreme confidence in that course of action of submitting no case to answer together with the prompt declaration of its unwillingness to adduce any evidence, had preempted the judge's next course of action. The effect of the upstaging was that the judge's application of his discretion, whether to rule upon that submission of no case to answer, to put counsel for the respondent to elect whether he will or will not call evidence was stopped in its tracks (*Halsbury's Laws of England* (4th edn) vol. 37, at p. 396; *Simirah v. Chua Hock Lee & Anor* [1963] 1 LNS 128; *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509).

[8] Why that course of action or format of submission was undertaken by the federal counsel was of no concern to the appellant; even if the respondent had been represented by a youthful federal counsel, the court could not detract from the fact that backing him was a powerful organization that could address and redress his shortcomings. If that officer had failings it should not be held against the appellant.

[9] By so dismissing the action promptly, the subordinate court as endorsed subsequently by the learned appeal judge, must have agreed with the submission of the respondent that there was no case to answer. Procedurally, by so agreeing with that submission, together with the option of not wishing to elect to call evidence, the judge had acted correctly when he thereupon meted down his decision.

[10] So where did the Sessions Court go wrong? It must be understood that once a defendant elects not to call for evidence, apart from him being bound by that election, the effect is also that all the evidence led by the plaintiff must be assumed to be true. This proposition of law was succinctly said in *Jaafar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor* [1997] 4 CLJ 509 at p. 528:

> For, once a defendant in civil proceedings elects not to call evidence, then all the evidence led by the plaintiff must be assumed to be true.

[11] Let us have a second look at the evidence as produced by the appellant. The appellant himself had taken the stand and asserted *inter alia* that an army vehicle had encroached onto his lawful path and had collided into him. In the course of the cross-examination he was honest enough to admit that it was so alleged ie, that it was an army vehicle as it looked like an army vehicle. The investigating officer who had testified had tendered a sketch plan and a key to that sketch. In the course of the investigation the replacement investigating officer had confirmed that the vehicle, which had collided into the appellant, carried registration number ZA 2596. Understanding the key of the sketch plan the following words were recorded: M/lori No. ZA 2596 yang berada di tempat kejadian. Loosely translated, it means that M/ lorry ZA 2596 was still at the place of accident. We were therefore satisfied that the source of information, pertaining to the plate number, was not hearsay based but obtained direct from the immobilized vehicle still left at the scene.

[12] The original investigating officer had passed away hence the assumption of that duty by the replacement officer. In the course of the re-examination this officer had said:

Dalam IP-nombor kenderaan pada kenderaan. Dalam gambar nombor ZA 2596. Polis tidak tahu sebenar tuan punya motor lori. Nombor ZA 2596, nombor tentera ((Interpreted version: In the IP-number of vehicle on vehicle. In the picture it carries ZA 2596. The police did not know the owner of the vehicle. ZA 2596 is an army vehicle).

[13] Despite the above evidence, which *prima facie* established:

i. that the appellant was in his lawful path;

ii. the 1st defendant had encroached onto the appellant's path;

iii. a collision had occurred;

iv. the vehicle driven by the 1st defendant carried number ZA 2596; and

v. testified by the investigation officer that that vehicle was owned by the army,

the court still had refused to accept the truth of the evidence, even in light of the non-existent rebuttal evidence. In relation to the plate number it is pertinent that r. 28 of the Motor Vehicles (Registration and Licensing) Rules 1959 (LN 173/1959) states:

Exemption from licence fees.

No fee shall be payable for a motor vehicle licence granted under these Rules in respect of:

(a) a motor vehicle which is the property of Government;

(b) …

[14] Under the heading of Fifth Schedule to the said Rules (Rules 2 and 5) under marks Part 1 – West Malaysia and Federal Territory of Labuan – the index marks for vehicles is given according to the status of the owner of the vehicle. According to the Rules all index marks starting with Z on a vehicle belongs to the armed forces. If this is read with r. 28, the index marked Z belongs to the government of Malaysia. I herewith reproduce the relevant portion in the 5th Schedule:

Status or Owner of Vehicle	Index Mark
Armed Forces ... Z: ZA: ZB: ZC: ZD: ZE: ZF: ZG; ZH: ZJ: ZK: ZL: ZM: ZN: ZP: ZQ: ZR: ZS: ZT: ZU: ZV: ZW: ZX: ZY: ZZ:	
Counsular Corps ... CC	
Diplomatic Corps ... DC	
...	

[15] From the above statutory illustration it is quite obvious, according to the Rules, that ZA 2596 belonged to the Government of Malaysia.

[16] In the Federal Court case of *Kek Kee Leng v. Teresa Bong Nguk Chin & Anor* [1978] 1 MLJ 61 Seah J had occasion to state:

> The law, as I understand it, is this. The owner of a motor-car is liable for the consequences of the negligent driving of that motor-car by one who is his servant ... But the vicarious liability of the owner of a motor-car for the consequences of someone else's negligent driving of the car is not limited to cases where the driver is his servant.

[17] In *Hewitt v. Bonvin* [1940] 1 KB 188, du Parcq, LJ in his judgment had stated the following:

> The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty.

[18] In *See Keng Wah v. Lim Tew Hong* [1955] 1 LNS 141, the plaintiff on 4 April 1955 was being taken to the sea-side by his elder sister See Yim Leng (PW6) together with two other sisters and a brother. They crossed half of Beach Road and stood on the road divider, which was in the middle of the road, for the traffic to pass. See Yim Leng was holding the plaintiff by his left hand. While they were standing there the car of the defendant driven by one Han Hung Juan ran into the plaintiff who fell backwards on to the road and sustained injuries. The plaintiff did not bring evidence to prove that Han Hung Juan, the driver of the car, was the servant or agent of the defendant but said that the fact of ownership was *prima facie* evidence that the car, at the material time, was being driven by the owner or by his servant or agent.

[19] The High Court had asked the correct question when it posed that the question to decide was whether the defendant had rebutted the presumption that Han Hung Juan was his servant or agent. The defendant had not call Han Hung Juan, a very material and essential witness. The court had remarked:

> The Court is entitled to the best evidence available before it can be called upon for a decision and if the defendant failed to call a material or essential witness and did not give any explanation why such a witness was not called then, I think, the Court is entitled to presume, in his absence, that the evidence of Han Hung Juan would not support the defendant's case (section 115 illustration (g) of the Evidence Ordinance (Cap. 4)) – In other words, I do not think the defendant has discharged the onus thrown upon him.

[20] The court thereafter had found for the plaintiff.

[21] From the given evidence and law as propounded, the driver who drove that impugned vehicle therefore must be presumed, to have driven it with the permission of the respondent. The presumption too is that the driver, who was the first defendant, was the servant or agent of the owner of the vehicle ie, the Government of Malaysia. To avoid that responsibility or nexus it was thus up to the latter to rebut that presumption.

[22] In the course of the appeal we had found the evidence satisfactory, reliable and by no stretch of the imagination farfetched, to vitiate the presumption of truth at the stage of the plaintiff. With the quality evidence before the court being presumed to be true, the logical step was for the court to find for the appellant, what with the respondent not being assisted by the non-materialization of rebuttal evidence (*Kayat & Anor v. Lim Yew Seng* [1971] 1 LNS 46).

[23] To complete the judgment, when we allowed the appeal, we were thus satisfied that the appellant had successfully established the ingredients of s. 5 of the Government Proceedings Act 1956. It reads:

> **Liability of the Government in tort.**
>
> Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any

A wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.

B

[24] One last hurdle to be considered was, even though the appeal was a rehearing, bearing in mind that it emanated from a case tried by a judge alone, should it have been sent back for a new trial in the circumstances of the case (*Young v. Rank* [1950] C 2 KB 510)? Having perused the notes of proceedings, it was clear that the submission of the respondent was of no case to answer simpliciter. It was not a submission of no case to answer based on unsatisfactory or unreliable nature of the evidence led by the plaintiff, and which would have caused us some trouble in arriving D at a just decision (*Storey v. Storey (supra); Yuill v. Yuill* [1945] 1 All ER 183 CA). Having considered the matter in its entirety we found no reason whatsoever to have it remitted for a new and costly trial. On reflection even if it were ordered the presiding court would eventually have found the case for the appellant.

E

[25] Based on all the above reasons, by a majority decision, we had allowed the appeal on liability, and thereupon set aside the High Court order. No order as regards the quantum was made as the appellant had withdrawn its dissatisfaction on this particular F matter at the later stages of the appeal. We also had ordered costs at all levels, with such costs to be paid by the respondent to the appellant. The deposit was ordered to be refunded.

James Foong JCA (dissenting):

G

Introduction

[26] We heard this appeal on 30 July 2007. By a majority decision, we allowed it with costs with me dissenting. I now give my reasons for doing so.

H

Facts

[27] As this case originated from the Sessions Court which went on appeal to the High Court and finally to us in the Court of Appeal, it is best that I describe the parties in their original I capacities to avoid confusion as to their status.

[28] In the statement of claim, the plaintiff alleged that he was collided into by a motor lorry ("said motor lorry") bearing registration number ZA 2596 while he was riding his motorcycle along Jalan Timur, Felda Selatan, Sungkai, Perak at about 11.30am on 19 September 1997. He claimed that the said motor lorry which was driven by the 1st defendant, a driver, servant and/or agent of the 2nd defendant, was negligent at the material time. Due to injuries sustained as a result of this accident, the plaintiff claimed special and general damages.

[29] Initially, in the Sessions Court, the 1st defendant appeared to be represented. But when the trial was about to begin, it was recorded on 29 January 2004 that he was unrepresented. And when the trial took place on 18 March 2004, he was not present. There is no statement of defence by the 1st defendant found in the appeal record.

[30] The 2nd defendant had filed a statement of defence and was represented at the trial. In the statement of defence, the 2nd defendant denies knowledge of the accident and refutes the plaintiff's claim that the 1st defendant was a servant and/or agent of the 2nd defendant at the material time.

[31] During the trial, at the close of the plaintiff's case, the 2nd defendant submitted no case to answer, and declared that it will not be calling any witness. Effectively, this means the 2nd defendant had elected to forfeit its rights to tender any evidence in court to defend its case, and would therefore rely on the evidence adduced by the plaintiff to maintain that the plaintiff had not established a case in law against it or that the evidence so far adduced was so unsatisfactory or unreliable that the plaintiff's burden of proving its claim had not been discharged – see *Ramayee Gengan & Ors v. Tan Yik Kok & Anor* [1983] 1 CLJ 326; [1983] CLJ (Rep) 828; *Niaz Bi Bi v. Mogah Omnibus Co Ltd* [1959] 1 LNS 67 and *U.N. Pandey v. Hotel Marco Polo Pte Ltd* [1978] 1 LNS 223.

[32] Over this contention, the Sessions Court ruled in favour of the 2nd defendant. The reasons given were: the plaintiff had failed to prove (a) the driver of the said motor lorry ZA 2596 was an "officer" under s. 5 of the Government Proceedings Act 1956 ("G P Act") and; (b) the 2nd defendant was the registered owner of the said motor lorry. Accordingly, the plaintiff's claim against the

2nd defendant was dismissed with costs. However, for completeness, the Sessions Court assessed damages and found that in the event that the 2nd defendant was liable, based on 100%, the plaintiff should be entitled to RM85,150 as general damages and RM745 for special damages with interest thereon. In respect of the 1st defendant, the Sessions Court made no order.

[33] Dissatisfied with this decision, the plaintiff appealed to the High Court. The High Court dismissed the plaintiff's appeal against the 2nd defendant on virtually the same grounds proffered by the Sessions Court. However, the appeal against the 1st defendant was allowed with damages as assessed by the Sessions Court.

[34] The notice of appeal filed by the plaintiff to this court is against the decision of the learned High Court Judge given on 29 November 2005. This covers both liability and quantum. However, when this court indicated to the plaintiff that his appeal would be allowed against the 2nd defendant, the plaintiff withdrew his appeal against quantum.

Plaintiff's Contention

[35] The main contention of the plaintiff in this appeal against the 2nd defendant is that since the motor lorry carried a licence plate bearing number ZA 2596, it must be presumed that this vehicle belonged to the military and therefore the property of the 2nd defendant, and anyone found driving it must also be presumed to be the servant and/or agent of the 2nd defendant. When these presumptions were raised, it was upon the 2nd defendant to adduce evidence to rebut them. Since the 2nd defendant had elected to tender no rebuttable evidence, the plaintiff's claim against the 2nd defendant ought to succeed.

Issue

[36] In view of the 2nd defendant's submission of no case to answer and elected to call no evidence, the only issue in this appeal is whether based on the evidence adduced, the plaintiff had established a case in law against the 2nd defendant or whether the plaintiff had discharged his burden of proof.

Principles Of Law

[37] To determine this issue, it is necessary to first set out the principles of law regarding the plaintiff's claim against the 2nd defendant. Going by the pleadings, the plaintiff's claim against the 2nd defendant is founded on vicarious liability: that the 2nd defendant is liable for the negligent act of the 1st defendant who was the driver, servant and/or agent of the 2nd defendant at the material time.

[38] According to *'Law of Tort in Malaysia'* by Norchaya Talib:

> Vicarious liability refers to a situation where A is liable to C for damage or injury suffered by C due to the negligence or other tort committed by B. A need not have done anything wrongful and A further need not owe a duty of care to C. *The most important condition for imposing liability on A is the nature of relationship between A and B and the tort committed by B is connected to the nature of this relationship.* This relationship is usually that of master and servant or employer and employee and as between a principal and his agent. (emphasis added).

[39] In a situation relating to motor accident, the Federal Court in *Karthiyayani & Anor. v. Lee Leong Sin & Anor.* [1975] 1 MLJ 119 @ 122 said:

> Although there is some force in saying that the fact of ownership is a valuable consideration in determining whether or not the driver is driving independently or for and on behalf of the owner, it would be surprising that that fact alone could saddle the owner with liability. It has never been the law that the owner of a car is responsible in law for damage done by the negligence of a person to whom the car is lent or whom he has permitted to use it …
>
> It can therefore be seen that the test of vicarious liability in such cases as the present is not the "interest and concern" argument. The principle that the owner of a car is vicariously liable for the user of it by someone whom he has permitted to use it if he has an interest or concern in the purposes for which it is being used, is not only unsatisfactory but unwarranted. Every person who permits another to use his car may be said to have an interest or concern in the car being carefully used and in most cases to have an interest or concern in the safety of the driver but it has never been the law that mere permission is sufficient to establish vicarious liability. A person who permits another to use his car

A does not become the former's agent if on his own volition he uses it for the owner's benefit, eg, a person using his brother's car with permission does not become the latter's agent because, remembering that the latter has a luggage at the shop he uses the car to collect it. If the journey is at the owner's own request as in *Ormrod*'s case or where the owner asks his brother to bring B the car to the railway station to meet him, then the driver can be said to do an act for the owner and acting as his agent. The owner is liable because he has authorized or requested the act or because the driver is carrying out a task or duty delegated to him, or because he is in control of the driver's conduct. He is not C liable just because he has given permission to use the car, and has an interest or concern in the purpose for which the car is being used. The phrase *qui facit per alium, facit per se* correctly expresses the principle governing vicarious liability.

D **[40]** This principle enunciated by the Federal Court was quoted in extenso by Gopal Sri Ram JCA in the Court of Appeal case of *Adnan Mat Jidin & Anor v. Irwan Wee Abdullah & Anor* [1997] 3 CLJ 181.

Application To The Facts

E

[41] From the evidence adduced there is little doubt that the 1st defendant was negligent in colliding into the plaintiff. But what is more important in this appeal is whether the 2nd defendant was vicariously liable for this negligent act of the 1st defendant. From F the principles disclosed, the plaintiff must first establish a relationship between the 1st defendant and the 2nd defendant and then to prove that the negligent act committed by the 1st defendant is connected to the nature of this relationship.

G **[42]** Was there a relationship between the 1st defendant and the 2nd defendant? Directly, there is none. The 1st defendant was in fact a Felda settler and there is no evidence to indicate that he was either a soldier or an employee or agent of the 2nd defendant at the material time. Indirectly, the plaintiff relied on the fact that the said motor lorry driven by the 1st defendant carried a military H number plate. Would this be sufficient to convince the court that the 2nd defendant and the 1st defendant had a relationship of a master and servant or a principal and an agent respectively?

I

[43] I am aware of a number of authorities that say that "where a car is driven by a person other than the owner, the presumption is raised that the driver of the car is the servant or agent of the owner" – see *Kayat & Anor v. Lim Yew Seng* [1971] 1 LNS 46. This proposition was followed in a number of authorities which are listed out comprehensively by Low Hop Bing J (as he then was) in *Damai Cheras Sdn Bhd & Anor. v. Poothapillai Krishnamoorthy* [1999] 5 CLJ 576. Though I accept this proposition but before this presumption applies, the pre-requisite of the motor vehicle actually belonging to the person accused of being vicariously liable must be established. This is necessary because it is not the motor vehicle that is vicariously liable; it is the owner of such vehicle who is. Thus it is essential that ownership of the motor vehicle involved must be proved and ascertained before this presumption can be effective. In *Kayat & Anor v. Lim Yew Seng (supra)* and *Damai Cheras Sdn Bhd & Anor v. Poothapillai Krishnamoorthy (supra)*, and all those cases cited therein relating to this proposition, as well as *Karthiyayani & Anor. v. Lee Leong Sin & Anor (supra)* and *Adnan Mat Jidin & Anor v. Irwan Wee Abdullah & Anor (supra)*, the ownership of the vehicle involved in the accident was established to belong to the person or body who was accused of being vicariously liable. But until and unless this is satisfied, this presumption cannot arise. So it is pointless to rely on these authorities to say that just because someone is driving someone else's vehicle and was negligent in causing the motor accident, the person who is supposed to be the owner of the motor vehicle is vicariously liable to the plaintiff without the need to positively prove that the vehicle belonged to the person being sued in a vicarious capacity.

[44] To prove ownership of a motor vehicle the best evidence would be a confirmation from the Director for Road Transport who keeps a register of all motor vehicles possessed or used on our roads as is required by s. 8 of the Road Transport Act 1987 ("RTA") to be read with s. 7 of the same Act. Alternatively, like in most of the cases cited above, ownership was not denied by the defendant concerned. But here in our instant case, the only proof advanced by the plaintiff was that the motor lorry carried a number plate that bore an index mark which according to r. 28 of the Motor Vehicles (Registration & Licensing) Rules 1959 (LN 173/1959) ("the Rules") reveals the status of the owner of the

vehicle as the Armed Forces and therefore the property of the Government of Malaysia. But is this sufficient? My answer is in the negative for the following reasons:

[45] First, the plaintiff had under cross-examination agreed to a suggestion put forth by the 2nd defendant that the motor lorry was carrying 'kelapa sawit' (palm fruit) and not a military lorry. This fact was fortified by the answer from the plaintiffs 2nd witness (PW2), a police officer who was associated with the investigation into the motor accident that: "Dulu askar tapi sekarang bukan motolori askar" (formerly military but now it is not a military lorry).

[46] Second, a vehicle number plate displaying an index mark followed by a set of numbers (which in this case was ZA 2596) mounted on a vehicle is only an indication that the vehicle is registered under s. 7 of the RT Act and the status of the owner. Indeed under the 5th Schedule, para. (2) of the Rules, the "Status of Owner of Vehicle" with an index alphabet "ZA" is the Armed Forces but as I have said, this is only an indication that such vehicle is associated with that establishment. "Status" as used in the 5th schedule of the Rules, in my view, only indicates position, rank or standing (see *'The Concise Oxford Dictionary'*); it does not confer ownership. To ascertain the ownership of the vehicle, reference must be made to the register kept by the Director of Road Transport. If a presumption of ownership of a motor vehicle, which amounts to no more than inferences logically drawn from one fact as to the existence of another, arising merely from an indication of a motor vehicle number plate then I am afraid that the burden of proof upon the plaintiff to establish various liability onto the 2nd defendant is too lenient and exceedingly light particularly when this involves liability of a party who did not directly commit the negligent act. Further, the consequences are far reaching should this be followed by the presumption that when a vehicle is driven by a person other than the owner it is presumed that he is the servant or agent of the owner. This would amount to a double presumption; an approach much discouraged by the courts in criminal cases which, in my view, should be applied with equal force to civil cases. To permit this would be to depart from the cherished principle of *ei qui affirmat non ei qui negat incumbit* probation (the burden of proof lies on him who affirms a fact not on him who denies it). I am of the

view that to warrant such departure from this established principle of common law there must be evidence of a more substantial and convincing nature since any presumption of fact should be cautiously exercised.

[47] Were I, however, to be wrong in arriving at the above conclusion and that the presumption establishing the ownership of the motor lorry to be that of the 2nd defendant, and assuming the second presumption that the driver being the servant and/or agent of the 2nd defendant has also arisen, there is still the requirements of s. 5 and s. 6(1) of the GP Act to be satisfied. These sections demand:

> **5 Liability of the Government in tort.**
>
> Subject to this Act, the Government shall be liable for any wrongful act done or any neglect or default committed by any public officer in the same manner and to the same extent as that in which a principal, being a private person, is liable for any wrongful act done, or any neglect or default committed by his agent, and for the purposes of this section and without prejudice to the generality thereof, any public officer acting or purporting in good faith to be acting in pursuance of a duty imposed by law shall be deemed to be the agent of and to be acting under the instructions of the Government.
>
> **6. Limits of liability of the Government.**
>
> (1) No proceedings shall lie against the Government by virtue of section 5 in respect of any act, neglect or default of any public officer, unless proceedings for damages in respect of such act, neglect or default would have lain against such officer personally.

[48] From these provisions, it is explicit that before the 2nd defendant can be held liable for the negligent act of its officer, there must be proceedings against the officer personally. And an "officer" under s. 2 of the GP Act:

> includes a person in the permanent or temporary employment of such Government and accordingly (but without prejudice to the generality of the foregoing) includes a Minister of such Government.

[49] The plaintiff had indeed commenced proceeding against the 1st defendant. But was the 1st defendant a person within the meaning of an officer under s. 2 of the GP Act? From evidence adduced, this fact is not established unless one relies on the presumption that a car is driven by a person other than the owner, it is presumed that the driver of the car is the servant and/or agent of the owner. But can this presumption arise in the face of an express statutory provision which demands actual proof of a fact? I do not believe that this vitiates s. 6 of the GP Act which specifies that such act, neglect or default must be laid against such officer personally. And the 1st defendant could not have been an officer as can be seen from the testimony of the plaintiff himself when he said "Rahman (the 1st defendant) ambil upah bawa kelapa sawit" (Rahman earned his living delivering oil palm). When the 1st defendant was engaged in such activity to earn a living how could he be an officer of the 2nd defendant? To claim that the 1st defendant could be under the temporary employment of the 2nd defendant this is also not probable. The military has no business or dealings in palm oil. Its role is to defend the nation. So the 1st defendant could not be under the temporary employment of the 2nd defendant. In the absence of such proof, I share the view expressed by the courts below that on the face of the evidence as presented by the plaintiff, the plaintiff has not proved his case against the 2nd defendant.

Conclusion

[50] Accordingly this appeal should be dismissed with costs.